Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,

Petitioner,

v.

CATHY FREESTONE, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do prescriptions of Title IV-D of the Social Security Act (42 U.S.C. §§ 651-669) vest in custodial parent-beneficiaries rights enforceable in a § 1983 action that may be maintained against the state administrator of a Congressionally mandated child support enforcement program failing to substantially comply with Congress' directives?

PARTIES TO THE PROCEEDING BELOW

Petitioner, Linda J. Blessing, is the Director of the Arizona Department of Economic Security ("the State Director"). She is the successor in office to Charles E. Cowan, who served as State Director during the proceedings below.

Respondents Cathy Freestone, Susan Harrington, Sonya Madrid, Judith Rogers and Esperanza Laustaunau ("Plaintiffs") are proposed class representatives who filed the underlying action individually, on behalf of their minor children and on behalf of all others similarly situated.

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RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Plaintiffs hereby oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF JURISDICTION

Plaintiffs accept the Statement in the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Plaintiffs accept the State Director's summation beneath the subheadings "Statutory Background" and "Proceedings Below", except in the following respects. The State Director notes that according to an audit conducted by the Department of Health and Human Services ("HHS") following implementation of a "new" corrective action plan, Arizona's child support enforcement program "had achieved substantial compliance" with Title IV-D of the Social Security Act (42 U.S.C. §§ 651-669). Pet. at 5. The State Director does not elaborate on the remark, nor does it enjoy any support in the record.

On the contrary; the record before the Court of Appeals showed that the State repeatedly had failed HHS audits and that its latest corrective action plan was due to expire six weeks after Plaintiffs filed their § 1983 action.

Pet. App. at 3a-4a. The record also contained a contemporaneous report of an internal performance audit by the State Auditor General, in which he concluded that the State's child support enforcement program was "barely functioning." *Id*. The District Court did not take evidence on any subsequent effort to achieve substantial compliance with Title IV-D, before nonetheless granting summary judgment for the State Director.

Plaintiffs also take exception to statements that the Court of Appeals perceived a sharp division of authority over the existence of § 1983 remedies for violations of Title IV-D. The Court of Appeals concluded that it joined an "impressive majority of courts," in holding that Title IV-D vests in custodial parents rights enforceable in § 1983 actions. Pet. App. at 10a. Similarly, contrary to the State Director's view, the Court of Appeals did not recognize "considerable tension" between the analytical approaches taken by this Court in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990) and *Suter v. Artist M.*, 503 U.S. 347 (1992). The Court of Appeals reasoned that because the cases were decided within two years of each other, *Suter* cannot be read as impliedly repudiating "settled legal principles" reiterated in *Wilder*. Moreover, the *Suter* majority cited and relied on *Wilder*, in analyzing federal regulations implementing the statutory scheme at issue in *Suter*. The Court of Appeals therefore viewed *Suter* as complementing *Wilder*, by providing "additional guidance on what is a 'binding obligation' and when an asserted interest may be deemed 'judicially enforceable' ", in an action predicated on 42 U.S.C. § 1983. Pet. App. at 13a-14a.

Plaintiffs cannot concur in the introduction to the Petition's Statement of the Case, at 2-3. The State Director marshals a parade of horribles, led by stock warnings that the decision below will open the floodgates to similar litigation against officials administering Title IV-D programs in the nine states comprising the Ninth Circuit. This specter is unsupported by any tangible indications that like Arizona, those states generally have not succeeded in sustaining substantial compliance with thoroughly elaborated requirements of Title IV-D.

Congress has expressed itself with exceptional clarity in providing that nothing less will suffice so long as states accept federal funding for child support enforcement programs. The prescription is faithful to Congress' judgment that "[t]he problem of welfare in the United States is, to a considerable extent, a problem of nonsupport of children by their absent parents." S. Rep. No. 1356, 93rd Cong., 2nd Sess. *reprinted* in 1974 U.S.C.C.A.N. 8133 at 8145. The State of Arizona is not reduced to a vassal of the Federal Government if the intended beneficiaries of Congress' design may call state officials to account for their continued failure to discharge the definitive obligations Arizona has knowingly undertaken on behalf of custodial parents and their children. The decision below does not contradict other cognizable Circuit authority, any more than it ignores this Court's precedents, nor does it thwart statutory purposes or cast aside elements of standing required by Article III of the Constitution. This Court, therefore, has no occasion to review the decision below.

REASONS FOR DENYING THE PETITION

This case presents the discrete question of whether Title IV-D of the Social Security Act vests in custodial parents rights enforceable in a § 1983 action otherwise maintainable against state officials whose administration of a child support enforcement program does not substantially comply with federal law. The question arises against the backdrop of a program so far from the mark that according to the State Auditor General, "regular support payments were received in only 3% of the approximately 275,000 cases assigned to DCSE and only 25% of these cases have a valid support order established." Pet. App. at 4a n.3. Indeed, on the eve of Plaintiffs' suit, shortcomings in program administration had become so pronounced that "Arizona's Title IV-D program had failed to collect hundreds of millions of dollars in delinquent child support payments." *Id.* The State nonetheless received federal reimbursements for its operating expenses ranging from 66% to 90% of annual costs. Pet. App. at 3a n. 1.

Just as the question presented is grounded in a factual setting that could not be less supportive of the pending Petition, it assuredly is not adrift in the "doctrinal vacuum" the State Director imagines. The precedents of this Court provide ample underpinnings for the decision below, devoid of the foundational cracks the State Director pictures. Pet. at 7. Nor, indeed, does the decision break with other Circuit authority similarly faithful to the teachings of this Court.

1. No Conflict Exists Between the Decision Below and Other Circuit Authorities Entitled to Consideration

The decision below is in accord with *Howe v. Ellenbecker*, 8 F.3d 1258 (8th Cir. 1993) and *Albiston v. Maine Commissioner of Human Services*, 7 F.3d 258 (1st Cir. 1993) – as well as *Monzon v. Martinez*, 833 F. Supp. 479 (E.D. Pa. 1993); *King v. Bradley*, 829 F. Supp. 989 (N.D. Ill. 1993); and *Behunin v. Jefferson County Dept. of Social Services*, 744 F. Supp. 255 (D. Colo. 1990). The State Director points to two other decisions from the Northern District of Illinois (*Mason v. Bradley*, 789 F. Supp. 273 (1992) and *Oliphant v. Bradley*, 1992 WL 153637 (Feb. 20, 1992)) holding, contrary to *King*, that Title IV-D does not create rights enforceable in § 1983 actions – but must concede that the Seventh Circuit has not passed on the question. The State Director is thus left with her argument that the decision below is directly contrary to *Carelli v. Howser*, 923 F.2d 1208 (6th Cir. 1991) and *Wehunt v. Ledbetter*, 875 F.2d 1558 (11th Cir. 1989). The notion proves without merit.

Wehunt was the earliest Circuit decision on the question presented. It has not been followed by the First Circuit (*Albiston*), the Eighth Circuit (*Howe*) or the Ninth Circuit (*Freestone*) – or, indeed, by the Sixth Circuit (*Carelli*). Although the State Director insists that like *Wehunt*, *Carelli* is irreconcilable with the decision below, *Carelli* explicitly rejected *Wehunt's* conclusion that Title IV-D does not create rights enforceable by custodial parents in § 1983 actions. 923 F.2d at 1210-13. In this pivotal respect, *Carelli* and the decision below also are in accord.

Wehunt, moreover, has not been cited by the Eleventh Circuit, or by district courts within it, as authority for propositions integral to the holding the State Director invokes. Those courts presumably have not relied on it for the same reason that *Wehunt* does not constitute good authority opposed to *Albiston*, *Howe*, *Freestone*, and *Carelli*: The Eleventh Circuit's decision was predicated on a mode of analysis since rejected by this Court.

Dissenting in *Wehunt*, Judge Clark argued that the majority resorted to the wrong inquiry in determining that Title IV-D does not vest in custodial parents rights enforceable in a § 1983 action. The majority, he concluded, erroneously analyzed the question in terms of whether the proponents could show that Title IV-D satisfies tests, enunciated in *Cort v. Ash*, 422 U.S. 68 (1978), for implying a right of action on a federal statute. *Wehunt*, 875 F.2d at 1568 (Clark, J., dissenting). Judge Clark's dissent was, of course, well-taken. One year after *Wehunt* was decided, this Court issued its decision in *Wilder*, holding that the Boren Amendment to Title XIX of the Social Security Act creates rights enforceable in a § 1983 action. *Wilder* explicitly rejected the view, taken by the majority in *Wehunt*, that the analysis prescribed by *Cort* applies to determinations of whether provisions of the Social Security Act are enforceable in § 1983 actions:

> This is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute. *See Cort v. Ash*, 422 U.S. 68, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975). In implied right of action cases, we employ the four-factor *Cort* test to determine

> "whether Congress intended to create the private remedy asserted" for the violation of statutory rights. [Citations omitted.] The test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. [Citations omitted.] Because § 1983 provides an "alternative source of *express* congressional authorization of private suits," *Middlesex Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 19, 101 S. Ct. 2615, 2625, 69 L.Ed. 2d 435 (1981), these separation-of-powers concerns are not present in a § 1983 case. Consistent with this view, we recognize an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy.
>
> *Wilder*, 496 U.S. at 508, n. 9.

Wilder therefore precludes reliance on *Wehunt*, as still-viable authority contradicting the decision below. The State Director is now left only with her contention that it directly conflicts with *Carelli*.

No conflict exists insofar as *Carelli*, like the decision below, concluded that Title IV-D creates rights enforceable in § 1983 actions. Conversely, in its determination that § 1983 remedies were foreclosed in *Carelli* itself, the Sixth Circuit's opinion displayed doctrinal weaknesses not unlike those fatal to the majority's decision in *Wehunt*: The *Carelli* Court (923 F.2d at 1213) primarily drew on dissenting opinions in *Maine v. Thibotout*, 448 U.S. 1, 33 (1980) (Powell, J., dissenting) and *Monroe v. Pape*, 365 U.S. 167, 222 (1961) (Frankfurter, J., dissenting) to bolster its

view that any grant of the relief then requested by custodial parents would trespass on state sovereignty. The State Director loudly echoes the contention, as though *Carelli's* heavy reliance on dissents in landmark cases were somehow enough to persuade this Court that it, too, ought to revisit such firmly settled questions as whether violations of right-creating federal statutes are actionable under § 1983.

The *Carelli* Court explicitly declined to hold, however, that HHS's mechanisms for rectifying noncompliance with Title IV-D are an absolute bar to § 1983 remedies for custodial parents seeking to vindicate rights that the statute does vest in them. 923 F.2d at 1213. Since then, every Court of Appeals presented with the question has reached the conclusion cogently expressed in *Howe*, 8 F.3d at 1263: "The federal government's authority to audit and impose monetary sanctions does not constitute 'comprehensive' remedies," sufficient to foreclose § 1983 relief for custodial parents at the mercy of a program that fails to substantially comply with Title IV-D requirements creating correlative rights in their intended beneficiaries. *Accord*, *Albiston*, 7 F.3d at 269; *Freestone*, Pet. App. at 23a-31a.

Furthermore, the Sixth Circuit recently conceded that its abstention-like ruling in *Carelli* must be narrowly confined, both in its scope and applicability, to avoid patent conflicts with this Court's precedents:

> However, Defendant has misread our *Carelli* decision, in which we made it clear that, with regard to the statute at issue in that case, "we do not conclude that private action is foreclosed under all circumstances by the comprehensiveness of the remedial process." [Citation and footnote omitted.] Nothing in *Carelli* remotely suggests that mere oversight by the Secretary in and of itself constitutes a remedial scheme so comprehensive as to foreclose a private remedy pursuant to § 1983; such a suggestion would not only be implausible, but would also be contrary to the explicit holding in *Wilder*. *Wood v. Tompkins*, 33 F.3d 600, 612 (6th Cir. 1994).

While *Wood* rightly bowed to the teaching of *Wilder*, *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 48 (1987), constitutes still other controlling authority compelling the same restrictive gloss on *Carelli*, as a case necessarily limited, in its specific application, to exceptional circumstances. The Department of Housing and Urban Development ("HUD") is charged with overseeing the program at issue in *Wright*. HUD not only has authority to audit program administration by state subdivisions and to impose monetary sanctions for non compliance with governing federal law, as does HHS in the case of Title IV-D programs: HUD is otherwise empowered to enforce the requirements of its underlying agreements with public housing authorities, the operations of which it "undoubtedly has considerable authority to oversee . . . " *Wright*, 479 U.S. at 424. Although certainly more comprehensive than the design for HHS oversight of Title IV-D programs, this scheme for administrative enforcement of right-creating federal laws does not foreclose § 1983 remedies for program beneficiaries. *Id.* at 428.

Hence, the decision below proves entirely faithful to dispositive precedents of this Court, in holding (Pet. App. at 26a) that HHS's "generalized powers" of statutory enforcement do not preclude § 1983 actions by custodial

parents in Plaintiffs' circumstances. *Accord, Wright*, 479 U.S. at 428, cited with approval in *Wilder*, 496 U.S. at 522. Indeed, the record before the Court of Appeals showed that HHS's audits, threats of fiscal sanctions and acceptance of state-crafted "corrective action plans" notwithstanding, the Arizona Title IV-D program was barely functioning on the eve of Plaintiffs' suit. This dismal status quo bore no resemblance to the extensive reform efforts, promising substantial compliance with Title IV-D, underway at the time *Carelli* was decided. *See* 923 F.2d at 1215-16. Had the decision below nonetheless barred § 1983 remedies for Plaintiffs, it would sharply conflict with *Carelli*. Conversely, on the record before it the Court of Appeals had sound reason to criticize *Carelli*, insofar as it deemed a demonstrably limited scheme of administrative enforcement sufficiently comprehensive to foreclose Plaintiffs' § 1983 claims.[1] In the meantime, the Sixth Circuit sought, in *Wood*, to conform *Carelli* to the teachings of

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[1] HHS audits are investigatory tools, not remedial measures. Should they reveal non compliance with Title IV-D requirements, HHS can impose modest reductions in federal funding for the state's Title IV-A program – at the expense of Title IV-D beneficiaries receiving AFDC. (Pet. App. at 32a-33a). This is a blunt instrument of doubtful utility, that must be swung at an innocent target, rather than comprehensive remedial machinery directly applicable to the Title IV-D program and usable by its intended beneficiaries. It therefore proves thoroughly incapable of blocking their resort to § 1983 enforcement actions. *Wilder*, 496 U.S. at 520-22, reiterating that "[t]he burden is on the State to show 'by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement' " (*Wright*, 479 U.S. at 423) and that this Court has never held the requirement satisfied except by Congress' explicit provision for remedial mechanisms open to persons with enforceable rights under its

Wilder controlling here. In the face of all these negativing factors, the asserted conflict between *Carelli* and the decision below vanishes.

2. The Court of Appeals Opinion Does Not Conflict With Relevant Decisions of this Court

Citing *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), the State Director argues that in Title IV-D, Congress did not give states sufficiently unambiguous notice that acceptance of federal funding for child support enforcement programs subjects recipients to the obligations asserted in Plaintiffs' § 1983 claims. That is so, the State Director says, because the statute merely requires

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enactments, irrespective of whether they authorize federal administrators to oversee the States' performance of statutory duties and impose monetary sanctions for non compliance. Similarly, under Title IV-D, corrective action plans amount to nothing more than remedial proposals, unilaterally advanced by State administrators, that cannot possibly shut off all access by program beneficiaries to federal remedies, contrary to *the* rationale for § 1983's enactment. *See, e.g., Wilder*, 469 U.S. at 523; *Wright*, 479 U.S. at 429, so holding with respect to actual state administrative or judicial remedies accessible to persons aggrieved by violations of federal law endowing them with rights nonetheless enforceable in § 1983 actions.

These dispositive realities do not cease to be such under controlling decisions of this Court, merely because – as in *Carelli* – HHS's oversight measures may nudge a particular state toward reforms potentially assuring substantial compliance with Title IV-D. Congress surely did not decide, *sub silentio*, to deny its intended beneficiaries recourse to venerable remedies for deprivations of rights vested in them by the statute, on the chance that HHS occasionally may cajole state bureaucrats into initiating a change of course.

"substantial compliance" with its design, a matter it liberally entrusts to HHS oversight. The State Director also likens this directive to the statutory provision disputed in *Suter*, which this Court held incapable of creating rights enforceable in a § 1983 action. The State Director thus glosses over decisive differences between Title IV-D and the laws at issue in *Pennhurst* and *Suter*.

In *Pennhurst*, this Court concluded that a contested section of the relevant law merely expressed a "congressional preference" for expansive goals, worthy of pursuit, but certainly not compulsory accomplishments. *Wright*, 479 U.S. at 423, quoting from *Pennhurst*, 451 U.S. at 19. Similarly, in *Suter*, the Court considered a federal statute cryptically requiring state grantees to maintain plans calling for "reasonable efforts" to prevent removal of abused and neglected children from their homes and to promote family reunification. Because the directive was not elucidated elsewhere in the law or in any required implementing regulations, it remained too amorphous to impose obligations enforceable in § 1983 actions. 503 U.S. at 361. Title IV-D does not bear any resemblance to either of these enactments.

In vivid contrast, Title IV-D is replete with highly concrete requirements, spelling out the particular services that a child support enforcement program must provide its congressionally intended beneficiaries.[2] *See* Pet. App. at 14a-16a, cataloguing such prescriptions. Title IV-D not only specifies mandatory program functions, but details

[2] *See* Pet. App. at 19a-20a, citing and discussing, *inter alia*, S. Rep. No. 93-1356 *reprinted in* 1974 U.S.C.C.A.N. 8133 at 8146.

the administrative procedures that states must institute, to ensure effective performance of required tasks. *Id.* In complete contradistinction to the legislation in *Suter* (503 U.S. at 357-58), as well as in *Pennhurst*, Title IV-D further prescribes "detailed criteria for measuring compliance with the statute" (Pet. App. at 16a) – thus ensuring that the law's dictates are judicially enforceable.

The State Director otherwise errs in insisting that Congress has merely spoken, in doubtful generalities, of "substantial compliance" with the law's thoroughly elaborated and tightly integrated mandates. Congress has declared that " . . . a state which is not in *full* compliance with the requirements of this part shall be determined to be in substantial compliance with such requirements *only if* the Secretary determines that any non-compliance with such requirements is of a technical nature which does not adversely effect the performance of the child support enforcement program." 42 U.S.C. § 603(h)(3). (Emphasis added.) This is a rigorous standard of compliance with the exceptionally definite duties imposed by the statute, more than sufficient to refute the State Director's contention that Congress has failed to unambiguously alert the states to the performance obligations they undertake in entering into program agreements with the Federal Government.

The State Director concedes that the implementing regulations codified to 45 C.F.R. Part 303 actually require full compliance with the Title IV-D mandates incorporated in them. This prescription eliminates any imaginable doubt about the extent of the duties states owe custodial parents and their children, once they accept

federal funding for two-thirds to nine-tenths of all program expenses. Citing the dissenting opinion in *Wright*, the State Director argues that the Part 303 regulations cannot be invoked to establish the existence of rights enforceable in § 1983 actions because Congress alone has the authority to prescribe correlative obligations. Of course, the underlying premise of this contention is false. It wrongly presupposes that Title IV-D itself fails to impose obligations sufficient to create enforceable rights, a proposition that as Plaintiffs have shown, flies in the face of the statute, this Court's leading precedents and all cognizable Circuit authority.

Furthermore, the dissenting opinion in *Wright* notwithstanding, this Court followed *Wilder* in *Suter*, and thus turned to statutory implementing regulations as a guide to the intendment of a law ostensibly creating rights enforceable in § 1983 actions. *Suter*, 503 U.S. at 360-61, concluding that the regulations failed to identify any statutory duty sufficient for the purpose. Congress, by contrast, has declared in Title IV-D that "the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating absent parents, establishing paternity, obtaining support orders and collecting support payments." 42 U.S.C. § 654(13). Among those prescriptions are the Part 303 regulations, that not only are "fully authorized," as were the HUD regulations in *Wright*, 479 U.S. at 420-21, n. 3. They are a set of particular "requirements and standards" dictating full compliance with specified mandates of Title IV-D, that Congress itself has ordered the states to obey.

In short, nothing in *Pennhurst* or *Suter* – or for that matter, the dissent in *Wright* – remotely suggests that this may be a case in which Congress has not clearly put states on notice of the obligations they incur, when they accept federal funding for maintenance and operation of child support enforcement programs. Congress has told the states exactly what they must do, as well as how they must do it – and by what criteria their performance shall be judged. Contrary to the State Director's companion notion, Congress thereby secured such tangible and definite interests of program beneficiaries as a "child's right to support, inheritance, and to know who his father is . . . " S. Rep. No. 93-1356 *reprinted in* 1974 U.S.C.C.A.N. 8133 at 8155.

Equally untenable is the State Director's claim that the decision below "dispenses with" elements of standing imposed by Article III of the Constitution. The contention holds that even if Plaintiffs won substantial compliance with Title IV-D, the upshot would not be "likely" redress for their underlying grievances, as required by *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), but only the "speculative possibility" that exists in any case. The State Director ignores the now-controlling averments of Plaintiffs' Complaint, while taking refuge in inapt authority.

Gloomy speculation aside, the State Director principally relies on *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).[3] In that case, however, this Court narrowly held

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[3] The State Director also cites *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). The case is inapposite. *Simon* holds that Article III standing does not obtain where the plaintiffs demand agency action that even if performed, cannot

that "in the unique context of a challenge to a criminal statute," the plaintiff "failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention." 410 U.S. at 617-18. The plaintiff demanded an order requiring the district attorney to prosecute the father of her child for failing to pay the support she sought. But the operative statute did "not follow the civil contempt model" (*Id.*) and therefore provide that if held to account by the district attorney, the delinquent father could exonerate himself by paying overdue support. The statute instead "creates a completed offense with a fixed penalty as soon as a parent fails to support his child," so that "if appellant were granted the requested relief it would result only in the jailing of the child's father," rather than in any definite prospect of support for his offspring. 410 U.S. at 618. Devoted exclusively to vindication of society's interest in enforcement of the criminal law, this purely penal regimen bears no resemblance to a Title IV-D program, which must employ methods carefully designed to secure the

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result in redress of their underlying grievances unless it chances to set in motion an attenuated chain of events, at the end of which complex societal arrangements are reordered as the plaintiffs desire. *See Allen v. Williams*, 468 U.S. 737, 759 (1984), citing *Simon*, 426 U.S. at 40-46. The instant case, by contrast, involves such precisely focused, direct action as collection of child support payments under a wage assignment order directed to a particular employer. Similarly, because Title IV-D meticulously prescribes acceptable methods of timely providing services for custodial parents (Pet. App. at 15a-18a), enforcement of its mandates in § 1983 actions does not hand federal courts a roving charter to determine the content and contours of state programs, as the State Director wrongly implies in quoting from *Williams*, 468 U.S. at 759-60.

interests of its intended beneficiaries as directly and effectively as possible.

In the instant case, the prospect of redress for the Plaintiffs is not, therefore, at all remote or speculative. Where, as here, Article III standing is questioned at the pleading stage, this Court " 'will accept as true all material allegations of the Complaint, and . . . construe the complaint in favor of the complaining party . . . ' " *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988), quoting from *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Plaintiff Freestone provided the Arizona Department of Child Support Enforcement ("DCSE") with all forms and information necessary for it to obtain a wage assignment from her ex-husband's employer. Pet. App. at 5a. Had the agency timely acted, collection of support would have resulted, without more. While the agency dallied for weeks at a time (*Id.*), Plaintiff Freestone's ex-husband left his job – not, however, to join the ranks of the unemployed, but to take another job at *higher* pay. Pet. App. at 5a. Recurrent agency delays in getting a wage assignment from his new employer again frustrated automatic collection of support, until Ms. Freestone's former husband obtained yet another job. On this occasion, the DCSE did perfect a wage assignment and collect support payments, but only in "sporadic" fashion, due to "continuing irregularities" in the process that the agency has not corrected or even sought to explain. *Id.*

Similarly, Plaintiff Harrington's ex-husband has lived and worked in Arizona at all times since their divorce. Pet. App. at 6a. Plaintiff Harrington herself has repeatedly located her ex-husband and notified the DCSE of his

whereabouts and current employment. The agency simply has failed to obtain wage assignments that would yield immediate support payments. *Id.* Plaintiff Madrid has cause to believe that the DCSE has collected child support in her case, but failed to remit the pass-through payments due her. *Id.* Throughout the last thirteen years, Plaintiff Rogers has sought the DCSE's help in establishing the paternity of her son, so that he can receive benefits due him on his father's social security earnings account. Plaintiff Roger's former husband has acknowledged paternity; in fact, his name appears on their son's birth certificate. The father's whereabouts have been known since Plaintiff Harrington began dealing with the DCSE, which has yet to obtain what should be an uncontested order determining paternity, necessary for perfection of the child's entitlement to social security benefits. Pet. App. at 6a-7a.

All of these allegedly representative cases are rooted in concrete circumstances making it indeed likely that the Plaintiffs will receive redress for their underlying grievances, if the DCSE is directed to perform discrete tasks, as required by Title IV-D, immediately sufficient to secure it. Such a definite likelihood is the antithesis of the speculative possibility presented in *Linda R.S.*, where the plaintiff sought a self-defeating means to her professed end, and in such cases as *Simon*, where the requested agency action held no promise of relief for the plaintiffs unless third parties chose to overhaul institutional policies and practices. Far from "dispensing with" elements of Article III standing, the decision below preserves them, by properly tracking the constitutionally sufficient facts and circumstances of the particular controversies actually at hand.

3. The Decision Below Does Not Undermine the Purposes of Title IV-D or the Civil Rights Act, to the Detriment of Federalism, Child Support Enforcement Programs or Custodial Parents

The State Director's entire line of argument is an appeal to fear, rather than reason, driven by dire predictions without basis in law or experience. The State Director thus conjures images of federal judges usurping state authority over numerous Title IV-D programs, as the decision below serves to overcome the constraints of a sound federalist design. These are badly distorted echoes of concerns voiced, with considerably more restraint, by dissents in *Monroe*, 365 U.S. at 222 and *Thibotout*, 448 U.S. at 33. This Court, moreover, has never questioned the continued validity of either decision in rejecting the minority views that the State Director tries to revivify.

Her attempt certainly does not find a hospitable reception in *Carelli*. It merely reasoned that once a state has committed itself to a genuine overhaul of its Title IV-D program, consistent with HHS audit findings, overlapping equitable remedies for program beneficiaries are not calculated to serve a useful enough purpose to justify their adjudication – so long as effective reform efforts are sustained. 923 F.2d at 1215-16. That is manifestly not this case. *Carelli* nonetheless demonstrates that the federal courts are more than capable of restraining some imagined impulse either to commandeer or trammel on a lasting, productive drive toward substantial compliance with Title IV-D.

The State Director, however, postulates that the courts of the Ninth Circuit cannot be expected to exercise

comparable restraint, despite clear evidence to the contrary in the decision below (Pet. App. at 35a n.14, 36a). She goes so far as to imply that equity itself is scarcely capable of soundly accommodating the interests of HHS, state administrators and custodial parents, should Title IV-D mandates become the subject of private enforcement proceedings under § 1983. This Court, however, has long since concluded that properly measured judicial enforcement of a federal statute is both an attainable and a valuable complement to enforcement by federal administrators, just as judicial passivity in the face of unremedied violations thwarts the purposes of Congress. *Hecht Co. v. Bowles*, 321 U.S. 321, 324-31 (1944).

Thus, in *Rosado v. Wyman*, 397 U.S. 397 (1970), the Court soundly rejected arguments that Congress' provision for approval by HHS of state Title IV-A plans – and for termination by HHS of federal funding, on subsequent noncompliance with Title IV-A – reveals an intent to "close[] the avenue of effective judicial review to those individuals [program beneficiaries] most directly affected by the administration of" state plans. The Court not only was "most reluctant" to make that assumption; 397 U.S. at 420: It found "not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field." 397 U.S. at 422.

The State Director simply fails to show that the principles emphatically laid down in *Rosado* do not control the availability of judicial relief for beneficiaries of a Title IV-D program – which is the mandatory, close companion

of the Title IV-A program calling forth the Court's pronouncements in *Rosado*. Hence, nothing of substance survives in the State Director's warning that the decision below has untoward ramifications, antithetical to Congress' intent in enacting Title IV-D, as well as § 1983. The contention remains a makeweight, equally devoid of support in statutory provisions, legislative history and the apposite decisions of this Court.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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